(14)

No. 98-1161

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1998

CITY OF ERIE, PA., *et al.*,
Petitioners,

v.

PAP'S A.M.,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF OF ORANGE COUNTY, FLORIDA, BY THE HONORABLE MEL MARTINEZ, AS COUNTY CHAIRMAN FOR ORANGE COUNTY, FLORIDA, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

Amicus is Orange County, Florida, a body corporate and politic existing under the laws of the State of Florida and the Orange County Charter. The Honorable Mel Martinez is the duly elected County Chairman for Orange County under the Orange County Charter. Pursuant to the Orange County Charter, the County Chairman is the chief executive of Orange County, with the authority to assure the faithful execution of all Orange County ordinances, resolutions and orders, and to ensure that they are enforced.

Orange County is presently defending against a challenge to the federal constitutionality of a public nudity ordinance similar to the City of Erie's public indecency ordinance. Orange County's Public Nudity Ordinance, adopted by the Orange County Board of County Commissioners by Ordinance No. 92-33 on October 28, 1992, and codified at Section 26-26 of the Orange County Code, is reprinted in full in the Appendix.

The subject federal lawsuit has been brought against Orange County in the Middle District Court for Florida by a career nude barroom stripper, in a case styled *Kim Gatena v. Orange County, Florida,* Case No. 98-417-CIV-ORL-22B. The Honorable Anne C. Conway, District Judge, is presiding. Ms. Gatena is contending in part, as does Respondent regarding Erie's ordinance, that the Orange County Ordinance is content based contrary to the Free Speech Clause of the First Amendment to the United States Constitution, and is unconstitutionally overbroad.

At present, District Judge Conway has under review competing motions for summary judgment and accompanying memorandums of law. Like a majority of the Supreme Court of Pennsylvania declared in *Pap's A.M. v. City of Erie*, 553 Pa. 348, 719 A. 2d 273 (1998), Ms. Gatena is asserting, in part, that *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), a plurality opinion where this Court upheld the federal constitutionality of a nearly identical Indiana public indecency statute, is impossible to understand, and is not binding precedent.

Amicus, being faced through its County Chairman with the duty of executing and enforcing the laws of Orange County, Florida, and the burden of defending against such federal lawsuits, has an interest in the resolution of the issue of whether a public nudity law along the lines of the City of Erie's passes constitutional muster.

Additionally, *amicus* has an interest in this Court revisiting the question of whether nude barroom "dancing" is indeed nonverbal expression as a matter of law.

SUMMARY OF ARGUMENT

Amicus maintains that this Court should decide that the Supreme Court of Pennsylvania erred in holding that Sections 1(c) and 2 of the Erie ordinance violate the Free Speech Clause of the First Amendment to the United States Constitution after it subjected the Erie ordinance to the strict scrutiny standard of review reserved for content-based regulations. In *Barnes*, a majority of this Court declined to apply the strict scrutiny test in upholding the federal constitutionality of a nearly identical Indiana public indecency statute.

Amicus also asserts that this Court should reexamine the issue of whether nude barroom strippers are engaged in nonverbal expression that is the functional equivalent of speech, as opposed to unprotected conduct, by referring to the two-part test set forth by this Court in *Spence v. Washington*, 418 U.S. 405 (1974), and hold that such activity should not automatically be deemed protected expression under the First Amendment.

ARGUMENT

I. THE SUPREME COURT OF PENNSYLVANIA ERRED IN DECIDING THAT *BARNES v. GLEN THEATRE, INC.* DOES NOT CONSTITUTE BINDING PRECEDENT TO UPHOLD SECTIONS 1(c) AND 2 OF THE CITY OF ERIE'S PUBLIC INDECENCY ORDINANCE PROHIBITING PUBLIC NUDITY AGAINST A CHALLENGE THAT IT VIOLATES THE FIRST AMENDMENT

In *Pap's A.M. v. City of Erie*, 553 Pa. 348, 719 A. 2d 273 (1998), the Supreme Court of Pennsylvania reviewed Sections 1(c) and 2 of the City of Erie's public indecency ordinance against a challenge that the Erie ordinance violated the Free Speech Clause of the First Amendment to the United States Constitution.

Section 1(c)of the Erie ordinance reads as follows:

> Section 1 . . .
> 1. A person who knowingly or intentionally, in a public place:
> . . .
> c. appears in a state of nudity, . . .
> . . . commits Public Indecency, a Summary Offense.

Section 2 defines the word "Nudity." Section 3 defines the term "Public Place" as "includ[ing] all outdoor places owned by or open to the general public, and all buildings and enclosed places owned by or open to the general public, . . ."

The Erie ordinance unequivocally announces in its preamble that the ordinance was adopted

> for the purpose of limiting a recent increase in nude live entertainment within the City, which activity adversely impacts and threatens to impact the public health, safety and welfare by providing an atmosphere conducive to violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases and other deleterious effects.

Despite acknowledging the "striking[] similar[ity]" between the Erie ordinance and an Indiana public indecency statute upheld by this Court in *Barnes*, *Pap's A.M.*, 719 A. 2d at 277, a majority of the Pennsylvania Supreme Court played kickball with *Barnes*, and compounded matters by circling the bases in the wrong direction. Not once, but twice, the majority in *Pap's A.M.* described the *Barnes* decision as "hopelessly fragmented." *Pap's A.M.*, 719 A. 2d at 276-77. While the *Barnes* decision was clearly "fragmented" (being a plurality opinion), the situation is not "hopeless."

Notwithstanding the plurality nature of the decision, it is undisputed that a majority of the *Barnes* Court --- five of the nine Members to be exact --- held that the nearly identical Indiana public nudity statute was valid and constitutional. In so doing, those five Justices concluded that the Indiana statute was not aimed at the suppression of expression protected by the First Amendment. Accordingly, none of those Justices believed that it was appropriate to resort to the strict scrutiny standard of review applicable to content-based laws.

Nevertheless, a majority of the Pennsylvania Supreme Court declared in *Pap's A.M.* that, aside from an agreement by eight of the nine Justices in *Barnes* that nude barroom dancing is entitled to some First Amendment protection, "we can find no point on which a majority of the *Barnes* Court agreed," and claimed that "no clear precedent arises out of *Barnes* on the issue of whether the [Erie] Ordinance . . . passes muster under the First Amendment." *Pap's A.M.*, 719 A. 2d at 278. As a consequence of its misreading of *Barnes*, the majority had no choice but to erroneously ascribe to the position of the *dissent* in *Barnes*, and utilize the strict scrutiny test to strike down the

Erie ordinance.

The concurring Justice in *Pap's A.M.* cogently summarized the core flaw with the majority's decision:

> I believe that the majority herein strains to find discord in *Barnes* where none exists. In so doing, the majority circumvents binding United States Supreme Court precedent. My disagreement with the majority centers on the fact that five Justices, and thus a majority, voted to uphold the ordinance in *Barnes* on the basis that the ordinance at issue in *Barnes* could not be characterized as relating to the suppression of free expression for purposes of the First Amendment. Therefore, a five-Justice majority declined to apply the strict scrutiny test.

Pap's A.M., 719 A. 2d at 282 (Castille, J., concurring).[1]

Because *Barnes* was a plurality decision, it is helpful to examine in greater detail the three opinions that made up the five-Member majority, remembering that the following principle regarding plurality opinions was enunciated in *Marks v. United States*, 430 U.S. 188, 193 (1977), citing *Gregg v. Georgia*, 428 U.S. 153, 169, n. 15 (1976):

> When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred

[1]The concurring Justice in *Pap's A.M.*, joined by another, concurred in the result reached by the majority based upon a belief that Sections 1(c) and 2 of the Erie ordinance violate Article I, Section 7 of the Pennsylvania Constitution, the counterpart to the First Amendment of the United States Constitution. *Pap's A.M.*, 719 A. 2d at 283-84. In so doing, he stated that the Supreme Court of Pennsylvania "has repeatedly determined that Article I, Section 7 affords greater protection to speech and conduct than does its federal counterpart, the First Amendment." *Id.* at 283. Of course, Article I, Section 7 has no relevance here.

> in the judgments on the narrowest grounds."

In *Barnes*, this Court addressed a challenge to the federal constitutionality of an Indiana public indecency statute which facially prohibited the conduct of public nudity across the board, *see Barnes*, 501 U.S. 569, n. 2, but which previously had been given a narrowing construction by the Indiana Supreme Court to exempt "some nudity as a part of some larger form of expression meriting protection, when the communication of ideas is involved." *Barnes*, 501 U.S. 569, n.1 (quoting *State v. Baysinger*, 272 Ind. 236, 247, 397 N.E. 2d 580, 587 (1979)). The lawsuit was brought by two establishments wishing to offer totally nude dancing as entertainment, and individual dancers who were employed at those establishments. They asserted that the First Amendment's Free Speech Clause precluded Indiana from enforcing its public indecency statute to prevent this form of dancing.

Chief Justice Rehnquist, joined by Justices O'Connor and Kennedy, stated at the forefront of the plurality opinion that "nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so." *Barnes*, 501 U.S. 566. Accordingly, in order to determine "the level of protection to be afforded to the expressive conduct at issue," the opinion analyzed the statute under the four-part test first set forth in *United States v. O'Brien*, 391 U.S. 367 (1968) for judging the constitutionality of a law regulating conduct containing both "speech" and "nonspeech" elements. *Barnes*, 501 U.S. at 566.

The *O'Brien* test may be summarized as follows:

> . . . [A] governmental regulation is sufficiently justified if [1] it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression

> of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Barnes, 501 U.S. at 567 (quoting *O'Brien*, 391 U.S. at 376-77).

According to the Chief Justice, the Indiana statute was "clearly" within the constitutional power of the State, thereby meeting the first *O'Brien* prong. *Barnes*, 501 U.S. at 567. The statute "further[ed] a substantial governmental interest in protecting order and morality," thus satisfying the second prong. *Id.* at 568-69. The purpose advanced by the statute was unrelated to the suppression of free expression because "[p]ublic nudity is the evil the State seeks to prevent, whether or not it is combined with expressive activity," thus complying with the third prong. *Id.* at 571. And "it is without cavil that the . . . statute is 'narrowly tailored'; Indiana's requirement that the dancers wear at least pasties and G-strings is modest, and the bare minimum necessary to achieve the State's purpose," thereby satisfying the fourth and final prong. *Id.* at 572.

Concurring in the judgment, Justice Scalia declared that the Indiana statute was "a general law regulating conduct and not specifically directed at expression, and [therefore] is not subject to First-Amendment scrutiny at all." *Id.* As a result, he stated that the statute only needed to survive rational basis review, not the intermediate standard of review used in *O'Brien* and by the plurality, in order to be valid under the Due Process Clause. *Id.* at 580. *See, e.g., San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 40 (1973) (stating that unless laws "create suspect classifications or impinge upon constitutionally protected rights," it need only be shown that they bear "some rational relationship to a legitimate state purpose.") Justice Scalia concluded that the statute easily passed that test. *Id.*

Justice Souter also concurred in the decision to uphold the Indiana statute. *Id.* at 581-87. He, like the Chief Justice, opined that "the nude dancing at issue here is subject to a

degree of First Amendment protection" *id.* at 581, triggering an analysis under the four-part test outlined in *O'Brien*. *Id.* at 582. He too concluded that the statute met each prong of the *O'Brien* standard.

Regarding the first prong of *O'Brien*, it was "clear" to Justice Souter that the statute fell within the constitutional power of the State. *Id.* at 583. As for the third prong, the second to be discussed in a moment, he found that the statute was not aimed at the suppression of expression, but was "content neutral." *Id.* at 585-86. Concerning the fourth prong, he noted that "[d]ropping the final stitch is prohibited, but the limitation is minor when measured against the dancer's remaining capacity and opportunity to express the erotic message." *Id.* at 587.

The only legally significant distinction between the opinions of the Chief Justice and Justice Souter pertains to the second prong of the *O'Brien* test. While the plurality said society has a substantial interest in protecting order and morality through such a statute, Justice Souter reasoned that the government's "substantial interest in combating the secondary effects of adult entertainment establishments," including "prostitution, sexual assault, and other criminal activity, . . . is sufficient under *O'Brien* to justify the State's enforcement of the statute against the type of adult entertainment establishments here." *Id.* at 582-83. He pointed out that that interest had already been found sufficient to justify regulating adult entertainment in *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71, n. 34 (1976), and *California v. LaRue*, 409 U.S. 109, 111 (1972).

Because Justice Scalia concurred with the plurality on broader grounds than did Justice Souter, the analysis of Justice Souter as the narrow grounds is applied under *Marks*. The plurality opinion and Justice Scalia's concurring opinion are broad enough to encompass the standard Justice Souter articulated. The reverse is not true. Justice Souter's opinion is thus the common rationale underlying this Court's decision

in *Barnes*.[2]

Barnes was understood and explained by not only the concurring Justice of the Pennsylvania Supreme Court in *Pap's A.M.*, but also the three judge panel of the Commonwealth Court of Pennsylvania in reversing the decision of the Court of Common Pleas of Erie County declaring the Erie ordinance unconstitutional. *Pap's A.M. v. City of Erie*, 674 A. 2d 338 (Pa. Commw. Ct. 1996).

The concurring Justice in *Pap's A.M.* and the Commonwealth Court of Pennsylvania are not alone in their understanding of *Barnes*. Federal courts have routinely construed Justice Souter's concurrence under *Marks* as the narrowest opinion in *Barnes*. *See, e.g., J&B Entertainment, Inc. v. City of Jackson*, 152 F. 3d 362, 370 (5th Cir. 1998); *Farkas v. Miller*, 151 F. 3d 900, 904 (8th Cir. 1998); *Triplett Grille, Inc. v. City of Akron*, 40 F. 3d 129, 134 (6th Cir. 1994); *International Eateries of America, Inc. v. Broward County*, 941 F. 2d 1157, 1160-61 (11th Cir. 1991), *cert. denied*, 503 U.S. 920 (1992); *SBC Enterprises, Inc., v. City of Burlington*, 892 F. Supp. 578, 582 (D. Vt. 1995); *Cafe 207, Inc. v. St. Johns County*, 856 F. Supp. 641, 644 (M.D. Fla. 1994), *aff'd*, 66 F.3d 272 (11th Cir. 1995), *cert. denied*, 517 U.S. 1156 (1996).

In applying the strict scrutiny standard of review to the Erie ordinance, the Supreme Court of Pennsylvania stood *Barnes* on its head, and disregarded that a five-Justice majority in *Barnes* had consciously declined to apply the strict scrutiny test to a legally indistinguishable statute.

In *Barnes*, all four opinions, including the dissent, accepted the premise that content-based scrutiny would apply if the Indiana statute had a purpose which was hostile to the

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[2]Occasionally, as happened with *Marks*, the plurality opinion *itself*, rather than a particular concurring opinion, may express "the narrowest grounds" for the result reached by a majority of this Court, and therefore constitute the holding.

communicative impact of public nudity. However, the majority of Justices thought that the statute was not directed at the *communicative* effect of nudity, but at the *conduct* of being nude. *See Barnes*, 501 U.S. at 571-72 (Rehnquist, C.J., plurality opinion) (determining that statute was aimed at conduct, not communicative impact, and upholding it under the intermediate scrutiny of *O'Brien*); *id.* at 579-80 (Scalia, J., concurring) (same, but rejecting applicability of *O'Brien* and upholding statute under rational basis review); *id.* at 586 (Souter, J., concurring) (stating that statute was aimed to curb such "secondary effects" as "prostitution and sexual assault," and upholding statute under intermediate scrutiny).

Justice Souter made the following key observation in *Barnes* regarding the third *O'Brien* prong:

> The third *O'Brien* condition is that the governmental interest be "unrelated to the suppression of free expression," 391 U.S. at 377, and, on its face, the governmental interest in combating prostitution and other criminal activity is not at all inherently related to expression. . . .
>
> *Because the State's interest in banning nude dancing results from a simple correlation of such dancing with other evils, rather than from a relationship between the other evils and the expressive component of the dancing, the interest is unrelated to the suppression of free expression.* . . . [T]he "secondary effects" justification [here] means that enforcement of the Indiana statute against nude dancing is "justified without reference to the content of the regulated [expression]," *ibid.* (emphasis omitted), which is sufficient, at least in the context of sexually explicit expression, [footnote omitted] to satisfy the third prong of the *O'Brien* test.

Barnes, 501 U.S. at 585-86 (emphasis added).

Although the majority of the Supreme Court of

Pennsylvania "acknowledged" in *Pap's A.M.* that a "stated purpose" of the Erie ordinance was "to combat negative secondary effects" of nude live entertainment, it proceeded to venture that "an unmentioned purpose" that was "inextricably linked" with this express purpose was "to impact negatively on the erotic message of the dance." *Pap's A.M.*, 719 A. 2d at 278-79. In other words, based upon this phantom illicit motive on the part of the City of Erie, the majority surmised that the Erie ordinance is not content neutral. Having so found, the majority, not surprisingly, reached "the inescapable conclusion" that the Erie ordinance did not pass the strict scrutiny review applicable to content-based regulations because it was not "narrowly tailored" to meet the admittedly compelling state interest of curbing sex crimes, such as prostitution and rape. *Pap's A.M.*, 719 A. 2d at 280.

Regarding the Pennsylvania Supreme Court's improper reliance on "an [illicit] unmentioned purpose" behind passage of the Erie ordinance, Justice Souter's following comment from *Barnes* is noteworthy:

> Our appropriate focus is not an empirical inquiry into the actual intent of the enacting legislature, but rather the existence or not of a current governmental interest in the service of which the challenged application of the statute may be constitutional. *Cf. McGowan v. Maryland*, 366 U.S. 420 (1961). At least as to the regulation of conduct [footnote omitted], "[w]e decline to void [a statute] essentially on the ground that it is unwise legislation which [the legislature] had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it." *O'Brien*, 391 U.S. at 384.

Barnes, 501 U.S. at 582-83.

Stated this Court in *O'Brien*: "It is a familiar principle of constitutional law that this Court will not strike down an

otherwise constitutional statute on the basis of an alleged illicit motive." *O'Brien*, 391 U.S. at 383. *See also Palmer v. Thompson*, 403 U.S. 217, 225-26 (1971); and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 268 (1977).

The *Barnes* Court upheld the Indiana public indecency statute despite the fact that it was enacted by the state legislature *without* an express finding that nude barrooms and strippers cause secondary adverse effects. Because it is established under *Barnes* and other cases decided by this Court that adverse secondary effects of proscribed conduct may be considered by a court in evaluating the governmental interests justifying impingement upon protected expression even where, as in *Barnes*, no legislative history demonstrates that the legislators actually considered such secondary effects in adopting the challenged law, it is rather curious, to say the least, why a provision of the Erie ordinance *expressly* declaring that the purpose of the Erie ordinance is to combat negative secondary effects of nude stripper bars was deemed legally insignificant by the majority of the Supreme Court of Pennsylvania in *Pap's A.M.*

The majority of the Supreme Court of Pennsylvania clearly erred in trying to explain away *Barnes* as controlling precedent regarding the issue of whether the "strikingly similar" Erie ordinance violates the Free Speech Clause of the First Amendment to the United States Constitution, and in applying the strict scrutiny standard of review to invalidate Sections 1(c) and 2 of the Erie ordinance.

Accordingly, Orange County respectfully requests that this Court should grant a writ of certiorari, and quash the

Supreme Court of Pennsylvania's decision.[3]

[3] Orange County notes that, although it held the Erie ordinance violated Respondent's freedom of expression as protected under the First Amendment, the Supreme Court of Pennsylvania expressly declined to address Respondent's overbreadth challenge. *Pap's A.M.*, 719 A. 2d at 281, n. 12.

While the Supreme Court of Pennsylvania opted not to address the overbreadth claim below, the Commonwealth Court of Pennsylvania did, specifically and properly holding that any overbreadth is neither "substantial" nor "real," given that the City of Erie's public indecency ordinance contains a provision expressly limiting its reach, *see* Section 6 of Ordinance 75-1994 ("... the provisions of this ordinance [shall] be construed, enforced and interpreted in such a manner as will cause the least possible infringement of the constitutional rights of free speech, free expression, due process, ..."), and that it is undisputed that a performance of "Equus" occurred at a theatre in the City of Erie after the City of Erie enacted the ordinance, apparently without incident. *Pap's A.M., 674 A.2d at 345-46.*

Nevertheless, because the Pennsylvania Supreme Court did not reach the question, Orange County submits that the overbreadth challenge need not be visited by this Court.

II. NUDE ACTIVITY AT AN ADULT ESTABLISHMENT, INCLUDING "DANCING" OR "PERFORMING," SHOULD NOT AUTOMATICALLY BE CONSIDERED PROTECTED NON-VERBAL EXPRESSION UNDER THE FIRST AMENDMENT

In *O'Brien*, Chief Justice Warren stated for this Court: "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *O'Brien*, 391 U.S. 367, 376 (1968).

A decade ago, this Court likewise remarked as follows in *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989):

> It is possible to find some kernel of expression in almost every activity a person undertakes - for example, walking down the street or meeting one's friends at a shopping mall - but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.

Clearly, restricting "speech" to just the spoken or written word is not a realistic view of how people communicate with one another. In many ways, nonverbal communication is speech. Much nonverbal conduct can communicate as effectively as the spoken or written word, if not more. As a result, a realistic definition of "speech" should encompass nonverbal conduct and symbols that are equivalent to verbal and written speech.

In *Spence v. Washington*, 418 U.S. 405 (1974), this Court enunciated the following two-part test in determining when nonverbal action or conduct is the equivalent of speech for purposes of the First Amendment: (1) whether there was "[a]n intent to convey a particularized message"; and (2) whether "in the surrounding circumstances the likelihood was great that the message would be understood by those who

viewed it." *Id.* at 410-11.

In *Spence*, the defendant was convicted of violating a so-called "improper use" statute, forbidding the superimposition of any advertising or other extraneous matter onto a flag. He had taped peace symbols to both sides of a privately-owned United States flag in reaction to the United States invasion of Cambodia and the killing of several students at Kent State University by the National Guard, and displayed the flag upside down from his apartment window. The peace symbols were about half the size of the flag surface, and the flag was plainly visible to passersby.

Because the defendant "did not choose to articulate his views through printed or spoken words," this Court decided in *Spence* that it was necessary to determine "whether his activity was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." *Id.* at 409. Reviewing the defendant's conduct under the foregoing factors, this Court pointed out that "his message was direct, [and] likely to be understood." *Id.* at 415. Thus, it determined that the conduct at issue was the equivalent of protected speech, and invalidated the conviction.

This Court applied the *Spence* criteria fifteen years later in *Texas v. Johnson*, 491 U.S. 397, 404 (1989). There, the defendant was convicted of violating a statute prohibiting the desecration of a venerated object. He had burned a U.S. flag in front of the Dallas City Hall in conjunction with a political demonstration during the 1984 Republican National Convention. This Court held that, under the circumstances, the defendant's act of burning the flag satisfied the *Spence* test, and overturned the conviction.

This Court noted in *Texas v. Johnson* that the same basic criteria described in *Spence* had been utilized by this Court in recognizing other conduct as nonverbal expression, including the wearing of black armbands to protest American military involvement in Vietnam, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 505

(1969); a sit-in by African-Americans in a "whites only" library to protest segregation, *Brown v. Louisiana*, 383 U.S. 131, 141-42 (1966); and the wearing of American military uniforms in a dramatic presentation criticizing United States involvement in Vietnam, *Schacht v. United States*, 398 U.S. 58 (1970).

Unfortunately, besides *Texas v. Johnson*, the *Spence* factors have not been applied in other cases where this Court has tackled the issue of whether a particular asserted nonverbal communication constituted "speech," including *Barnes*. *See also Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 289-300 (1984) (majority), *but see* 468 U.S. at 304-05 (Marshall, J., dissenting); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Stanglin.*

Speech, in whatever form, except for certain defined exceptions (*e.g.* obscenity, fighting words, child pornography), is protected under the First Amendment if it is equivalent to communication. *See, e.g., Texas v. Johnson*; *Spence; West Virginia State Bd of Educ. v. Barnette*, 319 U.S. 624, 632 (1943) (declaring that "symbolism is a primitive but effective way of communicating ideas"); *Cohen v. California*, 403 U.S. 15, 18 (1971) (stating that the *O'Brien* test was inapplicable because the only "conduct" which California sought to punish was "the fact of communication").

Commentators share this view. *See* Laurie Magid, Note, *First Amendment Protection of Ambiguous Conduct*, 84 COLUM. L. REV. 467, 493 (1984) (remarking that courts should examine the "likelihood that the act was intended to be communicative, and will be understood to be so"); Louis Henkin, *On Drawing Lines*, 82 HARV.L.REV. 63, 79-80 (1968). ("The meaningful constitutional distinction is not between speech and conduct, but between conduct that speaks, communicates, and other kinds of conduct. If it is intended as expression, if in fact it communicates, especially if it becomes a common comprehensible form of expression, it is 'speech.'").

So when does a particular *nonverbal act* actually

communicate? In order for nonverbal conduct to be the equivalent of speech, the actor must at least intend to send information or a message, and the information or message must have a meaning. *See Spence*, 418 U.S. at 410-11. *See also* Paul Ekman & Wallace Friesen, *The Repertoire of Nonverbal Behavior: Categories, Origins, Usage, and Coding*, SEMIOTICA 49, 55-56 ("Communicative nonverbal behavior encompasses those acts which are clearly and consciously intended by the sender to transmit a specifiable message to the receiver.") If someone intends to send a message through nonverbal conduct, it should have an identifiable meaning; otherwise, no message can hope to be communicated or understood.

Perhaps in light of the fact that the actor's subjective "intent" is sometimes difficult to ascertain, this Court looked in *Spence* to not only whether the actor intended to communicate a message, but also whether the message was likely to be comprehended by those who viewed it.

So what of nude barroom "dancing?" Orange County recognizes that eight Justices indicated in *Barnes* that nude barroom "dancing" is expressive to some degree. (Rehnquist, C.J., plurality) (. . . "nude dancing of the kind sought to be performed here is expressive conduct *within the outer perimeters* of the First Amendment, *though we view it as only marginally so.*") *Barnes*, 501 U.S. at 566 (emphasis added); (Souter, J., concurring) (". . . the nude dancing at issue is subject to *a degree* of First Amendment protection.") *Barnes*, 501 U.S. at 581 (emphasis added); (White, J., dissenting) ("[o]ur prior decisions permit no other conclusion.") *Barnes*, 501 U.S. at 587.

The dissent commented in *Barnes* that dance "is the communication of emotion or ideas." *Barnes*, 501 U.S. at 587, n. 1. Even if a nude barroom "dancer" genuinely intends to convey such a subliminal message, that is only the half of it under *Spence*. Is her (or his) message understood?

The dissent in *Barnes* also quoted with approval from the French poet Stéphane Mallarmé, who stated that the dancer

"writing with her body . . . *suggests* things which the written work could *express* only in several paragraphs of dialogue or descriptive prose." *Id.* But is suggestion the same thing as communication? If a woman wears "suggestive" clothing, does she intend to tell the interested observer that she is available for sex? An interested observer may draw such an inference, but such an inference does not mean that the wearer intended that the observer receive such a message.

In the area of freedom of speech, certainly "the courts must always remain sensitive to any infringement on *genuinely serious* literary, artistic, political, or scientific expression." *Miller v. California*, 413 U.S. 15, 22-23 (1973) (emphasis added). But nude barroom "dancing," the term "dancing" being a generous euphemism for the variety of nude activity which takes place at such establishments, does not express any genuinely serious political, sociological, educational, religious, cultural or artistic viewpoint or message. *Cf. Rathert v. Village of Peotone*, 903 F. 2d 510, 517 (7th Cir.) *cert. denied*, 498 U.S. 921 (1990) (prohibition against police officers wearing ear studs off duty upheld; ear studs convey no cultural political, sociological, religious or educational message.)

It simply assumes too much to surmise that whenever and wherever a worker appears nude before an audience at an adult establishment, such worker engages in expressive conduct as a matter of law. Under such an assumption, the idea of communication becomes meaningless. It is no different than concluding that nude dancers are constantly communicating a message, whether they intend to or not. Such activity does not as a rule constitute protected expression or inherently satisfy the *Spence* criteria used for ascertaining whether activity is nonverbal expression.

Instead of assuming that women (or men) communicate eroticism, sexuality, sensuality or some other remotely identifiable message simply by virtue of their appearing nude at an adult establishment, it should be presumed that nude barroom "dancing" is non-expressive conduct performed purely for functional reasons.

The reality of the situation is that although women (or men) choose to appear nude before an audience in an adult establishment for a multitude of personal reasons, the underlying, common thread is most probably nothing more than a utilitarian desire to earn compensation in exchange. How else does one explain why a nude barroom "dancer's" inferential message of "eroticism," "sexuality" or "sensuality" is directly proportional to the amount of tips she (or he) receives from patrons? Her (or his) conduct is obviously a functional activity in that it is done for pecuniary gain.[4]

When the conduct of being nude is a guise or pretense utilized to exploit nudity for profit or commercial gain, such as happens in an adult establishment, as opposed to a part of a bona fide live communication, demonstration or performance by such person wherein the nudity is expressive conduct incidental to and necessary for the conveyance or communication of a genuine message or expression, it should not be deemed nonverbal expression protected under the Free Speech Clause of the First Amendment.

At the very least, the issue of whether a worker at an adult establishment engaged in expressive conduct when she (or he) appeared nude is one which should be resolved by employing the *Spence* test. The fair questions to be asked are whether such worker intended to communicate a particular message, and if so, whether the message was likely to be understood by the audience.

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[4] Insofar as nude barroom "dancers" may assert that they "dance" nude as a political protest, or as a form of civil disobedience, Justice Scalia noted in *Barnes* that "virtually *every* law restricts conduct, and virtually *any* prohibited conduct can be performed for an expressive purpose---if only expressive of the fact that the actor disagrees with the prohibition." 501 U.S. at 576 (Scalia, J., concurring) (emphasis in original). Anyone who asserts that his or her violation of a law is a protest against that law should remember that "[o]ne would not be justified in ignoring the familiar red light because this was thought to be a means of social protest." *Cox v. Louisiana*, 379 U.S. 536, 545 (1964).

In answering those questions, it should not be forgotten that, according to *Spence* and *Texas v. Johnson*, the context and circumstances surrounding the conduct should be examined. In other words, did the worker actually intend during her (or his) nude exhibition to send some bona fide message as opposed to exploit nudity for commercial gain? In all candor, Orange County doubts whether nude barroom "dancers" intend to express any particular message at all.

In answering the foregoing questions, neither should it be lost that "[c]onduct or depictions of conduct that the state police power can prohibit on a public street do not become automatically protected by the Constitution merely because the conduct is moved to a bar or a 'live theater stage.'" *Paris Adult Theatre Inc. v. Slaton*, 413 U.S. 49, 67 (1973).

Nude barroom "dancing" should not be automatically deemed protected expression, or even marginally protected expression, but should be presumed to be conduct until shown otherwise under *Spence*.

CONCLUSION

Based on the foregoing reasons, *amicus* contends that the Supreme Court of Pennsylvania erred in disregarding binding precedent in *Barnes* in holding that Sections 1(c) and 2 of the City of Erie public indecency ordinance infringe the Free Speech Clause of the First Amendment.

Amicus further asserts that nude conduct in an adult establishment does not constitute protected nonverbal expression as a matter of law. Rather, such conduct should be presumed unprotected. When a claim is made that such conduct is protected expression, the *Spence* test should be utilized in determining whether the "activity was sufficently imbued with elements of communication to fall within the scope of the First Amendment," *Spence*, 418 U.S. at 409, or whether instead it was merely a guise or pretense utilized to exploit nudity for profit or commercial gain.

Respectfully submitted,

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August 20, 1999

CERTIFICATE OF SERVICE

I, Joel D. Prinsell, hereby certify that three copies of the foregoing Brief of Amicus Curiae, Orange County, Florida, were served this 20th day of August 1999, by priority mail, postage prepaid, to the following persons at the addresses listed below:

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APPENDIX

Sec. 26-26. Public nudity.

(a) *Title.* This section shall be known as the "Orange County Public Nudity Ordinance."

(b) *Intent.* It is the intent of this section to protect and preserve the health, safety and welfare of the people of Orange County by prohibiting any person from knowingly or intentionally appearing nude in a public place, or knowingly or intentionally causing or permitting another person to appear nude in a public place, within the unincorporated area of Orange County, subject to the following three (3) exceptions:

(1) When such person appears nude in a public place provided or set apart for nudity, and such person is nude for the sole purpose of performing a legal function that is customarily intended to be performed within such public place, and such person is not nude for the purpose of obtaining money or other financial gain for such person or for another person or entity; or

(2) When the conduct of being nude cannot constitutionally be prohibited by this section because it constitutes a part of a bona fide live communication, demonstration or performance by such person wherein such nudity is expressive conduct incidental to and necessary for the conveyance or communication of a genuine message or public expression, and is not a guise or pretense utilized to exploit nudity for profit or commercial gain (see, for example, *Barnes v. Glen Theatre, Inc.*, ____ U.S. ____ 111 S.Ct.

2456, 115 L.Ed.2d 504 (1991); and *Hoffman v. Carson*, 250 So. 2d 891 (Fla. 1971); or

(3) When the conduct of being nude cannot constitutionally be prohibited by this section because it is otherwise protected by the United States Constitution or Florida Constitution.

(c) *Findings.* The board of county commissioners finds and determines as follows:

(1) Since the beginning of civilization, appearing nude in a public place which is not a public place provided or set apart for nudity has been considered improper (see *Moffet v. State*, 340 So. 2d 1155, 1156, n. 3 (Fla. 1977), which quotes Genesis 3:7 (King James)); and

(2) Appearing nude in a public place which was not a public place provided or set apart for nudity was a criminal offense at common law and was considered an act *malum en se* (wrong in itself); and

(3) Appearing nude in a public place which is not a public place provided or set apart for nudity is engaging in conduct which often serves to impose such person's nudity on others who did not seek it out, who are not able to reasonably avoid observing it, and who may be offended or distressed thereby; and

(4) Appearing nude in a public place which is not a public place provided or set apart for nudity is still subject to general disapproval by the people of Orange County; and

(5) The appearance of persons in the nude in public places which are not public places provided or set apart for nudity generally increases incidents of prostitution, sexual assaults and batteries, attracts other criminal activity to the community, encourages degradation of women, and facilitates other activities which break down family structures and values; and

(6) Without regulation, appearing nude in a public place which is not a public place provided or set apart for nudity constitutes harmful conduct; and

(7) Orange County is a family oriented area; and

(8) Orange County is an area that is known for and whose economy is largely dependent upon its popular tourist and family oriented attractions, such as the Magic Kingdom, EPCOT Center, Sea World, Disney-MGM Studios, Universal Studios; and

(9) Regulation of public nudity will protect and preserve the public health, safety and welfare of the people of Orange County by restricting, to the fullest extent allowed by the United States Constitution and Florida Constitution, the act of being nude to nonpublic places or public places provided or set aside for nudity; and

(10) Nonregulation of persons appearing nude in public places which are not public places provided or set apart for nudity within the unincorporated area of Orange County would

encourage entities and persons to exploit nudity for profit or commercial gain and to advertise outside of Orange County and the State of Florida the availability of and opportunity for nudity in public places which are not places provided or set apart for nudity within the unincorporated area of Orange County, and thus would encourage the influx into the unincorporated area of Orange County of persons seeking to observe and/or participate in such nudity, and to participate in the disorderly, harmful and illegal conduct that is associated therewith, thereby increasing injuries and damages to the people of the unincorporated area of Orange County who will be the victims of such increased disorderly, harmful and unlawful conduct; and

(11) The prohibitions contained herein are the most reasonable and minimum restrictions required so as to regulate conduct which is adverse to public order within the unincorporated area of Orange County, when such conduct occurs in a public place which is not a public place provided or set apart for nudity; and

(12) States may regulate the conduct of appearing nude in places which are not public places provided or set apart for nudity (see *Barnes v. Glen Theatre, Inc.*, ____ U.S. ____, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991)); and

(13) The exemptions contained in this section provide adequate protection to persons who, without such exemptions, might be prevented or discouraged by this section from exercising

constitutionally protected rights; and

(14) This section regulates conduct, not speech.

(d) *Definitions.*

(1) *Entity* means any proprietorship, partnership, corporation, association, business trust, joint venture, joint-stock company or other for profit and/or not for profit organization.

(2) *Nude* means to display or expose the male or female genitals, pubic area or the female breast with less than a fully opaque covering of any part of the areola and nipple, or the showing of the covered male genitals in a discernibly turgid state. For purposes of this definition, body paint, body dye, a tattoo, latex, or any similar substances shall not be considered an "opaque covering."

(3) *Person* means any human being at least ten (10) years of age.

(4) *Public place provided or set apart for nudity* means an enclosed public restroom, an enclosed functional shower or locker room facility, an enclosed sauna, a motel room or hotel room designed and intended for sleeping accommodations, or at the location of a bona fide private club whose membership as a whole engages in social nudism or naturalism (a nudist resort or camp), and any similar public places in which nudity is necessarily and customarily expected outside of the home and the sphere of privacy constitutionally protected therein.

(5) *Public place* means any location open to the common and general use, participation or enjoyment of the public where the public is present or likely to be present, or any location where the public is invited and is free to go upon special or implied invitation, or any location where a person may reasonably be expected to be observed by the public. A public place includes, but is not limited to, a street, sidewalk, park, beach, business or commercial establishment (whether for profit or not for profit and whether open to the public at large or where entrance is limited by a cover charge or membership requirement), bottle club, hotel, motel, restaurant, night club, country club, cabaret, or meeting facility utilized by a religious, social, fraternal or similar organization.

(e) *Public nudity.* Subject to the exemptions set forth in subsection (f) below, it shall be unlawful for any person to knowingly or intentionally appear nude in a public place, or to knowingly or intentionally cause or permit another person to appear nude in a public place.

(f) *Exemptions.* The offense of public nudity contrary to subsection (e) above shall not occur in any of the following three (3) instances:

(1) When a person appears nude in a public place provided or set apart for nudity, and such person is nude for the sole purpose of performing a legal function that is customarily intended to be performed within such public place, and such person is not nude for the purpose of obtaining money or other financial gain for such person or for another person or

entity; or

(2) When the conduct of being nude cannot constitutionally be prohibited by this section because it constitutes a part of a bona fide live communication, demonstration or performance by such person wherein such nudity is expressive conduct incidental to and necessary for the conveyance or communication of a genuine message or public expression, and is not a guise or pretense utilized to exploit nudity for profit or commercial gain (see, for example *Barnes v. Glen Theatre, Inc.*, ____ U.S. ____, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991); and *Hoffman v. Carson*, 250 So. 2d 891 (Fla. 1971); or

(3) When the conduct of being nude cannot constitutionally be prohibited by this section because it is otherwise protected by the United States Constitution or Florida Constitution.

(g) *Violation of subsection (e).* Whoever violates subsection (e) above may be punished as provided in section 1-9 of the Orange County Code.